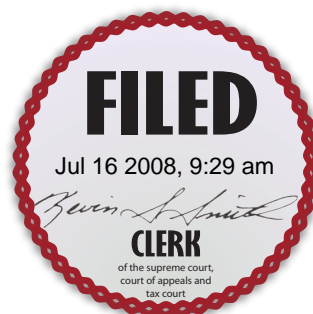


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

WILLIAM C. BURNS,

Appellant-Petitioner,

vs.

STATE OF INDIANA,

Appellee-Respondent.

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No. 84A01-0711-PC-521

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable David Bolk, Judge
Cause No. 84D03-0209-PC-02625

July 16, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

William C. Burns appeals the post-conviction court's denial of his petition for post-conviction relief from his conviction and sentence for felony murder. Specifically, he contends that his trial counsel was ineffective for failing to call witnesses who would have provided exculpatory testimony. Concluding that his trial counsel was not ineffective, we affirm the post-conviction court.

Facts and Procedural History

The facts of this case as summarized by our Supreme Court on direct appeal are as follows:

On December 11, 1997, Burns arranged through his friend Kenny Ingle to buy \$500 worth of "crank" from Robert Phillips. Burns examined the product at the home of Tammy Baggett in the presence of Shaun Seeley and Lester Hamilton. Hamilton and Seeley agreed with Burns that the crank was too powdery to be of the promised quality and that Burns had been "ripped off." Burns announced his intention to get his money back. Hamilton testified that Burns said something akin to, "[L]et's go over there and take that guy's shit," meaning "robbing him." Burns either asked for or was offered Seeley's gun and concealed the weapon in the back of his pants. He then asked Seeley and Hamilton to accompany him to Ingle's house and they agreed.

When Burns, Seeley, and Hamilton arrived, Phillips and Ingle were smoking marijuana on Ingle's waterbed, and Ingle's girlfriend and son were in the living room. Burns, followed by Seeley and Hamilton, entered the bedroom to confront Phillips. According to Ingle and Seeley, Burns, perhaps referring to the gun, said something like, "[L]ook at what I've got." Phillips then attempted to push Burns away from him, and Burns testified that he "stuck [the gun] between [Phillips'] eyes." The gun discharged seconds later, killing Phillips. Seeley testified that Burns then emptied Phillips' pockets of as much as \$1800 in cash as well as crank, marijuana, and a wallet. Burns testified that, "if anything," he intended to "hit [Phillips] with the gun" while the others "jumped on" Phillips.

Hamilton left the house after helping Burns and Seeley load Phillips' body into a car trunk. Seeley suggested they could dispose of the body near

Seeley's grandmother's house. Burns and Seeley drove to the site where they unloaded Phillips' body, threw wood on top of it, and set the pile on fire. When the pile did not burn well, they secured oil from an all-night convenience store and poured it on the body. Burns threw the gun into a nearby pond. In the meantime, Ingle had left the house for Ingle's parents' home as soon as his girlfriend and their son could dress. His parents soon convinced Ingle to call the police. Burns and Seeley later returned briefly to Baggett's where they found Hamilton and were told that the police were looking for Burns, Seeley, and Hamilton. Burns, Seeley, and Hamilton then returned to the woods to bury the body. Hamilton stood watch while Burns and Seeley dismembered the remains, shoveled them into a duffle bag, and buried them in a shallow grave.

Seeley and Hamilton were apprehended early the next morning before they were able to leave town. Burns hid out for several weeks, then took a bus to Wyoming, but was ultimately convinced by his grandfather to return to Indiana and surrender to the authorities. Before he could complete the trip, he was arrested in Chicago and brought back to Indiana.

Burns first told police that Seeley had engaged in the drug transaction and killed Phillips, but, after being confronted with several conflicting statements, confessed to both the drug transaction and to killing Phillips. Burns was charged with murder and felony murder, and was convicted of felony murder in a three-day jury trial in July of 1998.

Burns v. State, 722 N.E.2d 1243, 1244-45 (Ind. 2000) (footnote omitted).

Thereafter, Burns filed a direct appeal with the Indiana Supreme Court and argued that the State put forth insufficient evidence to sustain his conviction for felony murder. Thereafter, our Supreme Court affirmed the trial court's judgment. *Id.* at 1246. On September 20, 2002, Burns, *pro se*, filed a verified petition for post-conviction relief alleging evidentiary violations, sentencing errors, and ineffective assistance of counsel. Subsequently, Burns, by counsel, amended his petition and alleged that his trial counsel was ineffective for failing to present witnesses at trial that would have testified that during the time immediately following the incident on December 11, 1997, he did not have any money in his possession.

An evidentiary hearing was held at which Burns presented the testimony of two witnesses, Stephanie Schommer and Stacy Lowe, who testified that they saw Burns within a few days of Phillips' murder. Lowe testified that when she saw Burns she purchased forty dollars worth of groceries for him because he did not have any money. Schommer testified that Burns stayed with her at her house from approximately one week after the murder until the day before he was arrested, that during that time his only possessions were the clothes that he was wearing and that he had no money for food. Burns' trial-level defense counsel, Daniel L. Weber, testified that while preparing for Burns' trial, Burns provided him with contradictory statements and never mentioned that he had stayed with Schommer. Attorney Weber did not recall speaking with Lowe. At the conclusion of the hearing, the post-conviction court issued findings of fact and conclusions thereon denying Burns' post-conviction claims, stating that even assuming the witnesses testified truthfully, "[n]ot having money on Burns' person two (2) to seven (7) days after the shooting does not prove Burns did not rob the victim, especially in light of all the evidence to the contrary." Appellant's App. p. 65. Burns now appeals.

Discussion and Decision

Burns appeals the denial of post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment, *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004), and we will not reverse the judgment unless the evidence unerringly and unmistakably leads to the

opposite conclusion, *Patton v. State*, 810 N.E.2d 690, 697 (Ind. 2004). We also note that the post-conviction court in this case entered findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). We will reverse a post-conviction court's findings and judgment only upon a showing of clear error, which is that which leaves us with a definite and firm conviction that a mistake has been made. *Hall v. State*, 849 N.E.2d 466, 468 (Ind. 2006). Such deference is not given to conclusions of law, which we review *de novo*. *Chism v. State*, 807 N.E.2d 798, 801 (Ind. Ct. App. 2004).

Specifically, Burns maintains that his trial counsel was ineffective for failing to call witnesses who would have provided exculpatory testimony. We disagree. The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to effective assistance of counsel. *Koons v. State*, 771 N.E.2d 685, 690 (Ind. Ct. App. 2002), *trans. denied*. We review the effectiveness of trial counsel under the two-part test provided by *Strickland v. Washington*, 466 U.S. 668 (1984). *Bieghler v. State*, 690 N.E.2d 188, 192-93 (Ind. 1997). To succeed on his ineffective assistance claim, Burns must demonstrate that counsel's performance fell below an objective level of reasonableness based upon prevailing professional norms and that the deficient performance resulted in prejudice. *Strickland*, 466 U.S. at 687-88. "Prejudice occurs when the defendant demonstrates that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Grinstead v. State*, 845 N.E.2d 1027, 1030 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694)).

Here, no prejudice was shown. The fact that two witnesses testified that between two to seven days after the felony murder occurred Burns did not have any money does not make it less likely that he committed or attempted to commit the robbery. Nor does it make it likely that he would have been found not guilty of felony murder had the evidence been presented. The evidence presented at trial shows that after articulating his disappointment with the quality of the “crank” he had purchased from Phillips, Burns announced his intention to get his money back. Burns either asked for or was offered a gun and concealed the weapon in the back of his pants. After arriving at Phillips’ house, Burns “stuck [the gun] between [Phillips’] eyes[,]” and the gun discharged seconds later. *Burns*, 722 N.E.2d at 1244. Seeley testified “that Burns then emptied Phillips’ pockets of as much as \$1800 in cash as well as crank, marijuana, and a wallet.” *Id.* This evidence is overwhelming, and there are many possible explanations why Burns did not have money two to seven days after the crime. Because Burns has failed to satisfy his burden of showing prejudice, Attorney Weber’s failure to call Schommer and Lowe as witnesses does not constitute ineffective assistance of counsel.

Affirmed.

MAY, J., and MATHIAS, J., concur.